Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

JAMES M. ALLEN,
First Lieutenant (O-2), United States Air Force,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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February 2001

QUESTION PRESENTED

Whether the Government's Criminalization of the Private, Consensual, Non-Commercial Sexual Conduct of a Married Couple Violates Their Fundamental Constitutional Right to Marital Privacy.

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James M. Allen, First Lieutenant (O-2), United States Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Allen*, 53 M.J. 402 (2000), is located in Appendix A at 1a-16a. The opinion of the Air Force Court of Criminal Appeals, *United States v. Allen*, unpublished, ACM 32727, (A.F. Ct. Crim. App. 1999), is located in Appendix B at 17a-44a.

JURISDICTION

The lower court entered its judgment on August 30, 2000. Petitioner filed a timely petition for reconsideration, which was denied on November 8, 2000. App. C. at 45a This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).).

CONSTITUTIONAL PROVISION AND LAW INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person ... shall be deprived of life, liberty, or property, without due process of law. . . .

The Constitution recognizes a right of privacy with respect to those rights regarded as "fundamental" or "implicit" in the concept of ordered liberty. *Roe v. Wade*, 410 U.S. 113 (1973). Although the right to privacy is not a specifically enumerated right in the Constitution's Bill of Rights, that right exists within the penumbra of the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Article 125, UCMJ, 10 U.S.C. § 925, states:

(a) Any person subject to this chapter who engages in unnatural carnal copulation[1] with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.[2]

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[1] The Manual for Courts-Martial defines "unnatural carnal copulation" as encompassing both oral and anal sodomy.

[2] Consensual sodomy with an adult carries a maximum punishment of

Twelve states currently have statutes which prohibit sodomy between same sex and opposite sex couples, including married couples.[3] These include Arizona, Florida, Idaho, Louisiana, Michigan, Massachusetts, Minnesota, Mississippi, North Carolina, South Carolina, Utah and Virginia.

STATEMENT OF THE CASE.

I. Facts.

At trial Petitioner's ex-wife, Kathleen Allen, testified that "sometime in 1991" the Petitioner, then her husband, first engaged in anal sodomy with her. She claimed that this occurred during a time period when she was a stripper and a prostitute and that during that time Petitioner "became more assertive over what he wanted to do without regard to my own feeling."

Mrs. Allen testified that the anal sodomy occurred

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a dishonorable discharge, forfeiture of all pay and allowances and confinement for five years. The maximum confinement increases to life without the possibility of parole for cases involving forcible sodomy with an adult, or those involving non-forcible sodomy with a child under the age of 12 years If the child is over 12 years old but under 16 years old, the maximum confinement is 20 years.

[3] One state exempts married couples from its anti-sodomy statute. (Alabama). Five states prohibit sodomy only between same sex couples. (Arkansas, Kansas, Missouri, Oklahoma and Texas). Seven state statutes on sodomy have been struck down by state courts, generally based on a right to privacy found within their state constitutions. (Georgia, Kentucky, Maryland, Montana, New York, Pennsylvania and Tennessee). The legislatures of twenty-five states and the District of Columbia have repealed their sodomy laws. (Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming).

approximately ten times, with the last incident occurring in September 1992. The acts of anal sodomy occurred in Nebraska and Colorado[4]. These acts were done in the privacy of the Allen's home and as part of their marital relationship.

Mrs. Allen never testified that she was forced to have anal sodomy with her husband. Instead, she testified that Petitioner would be persistent in asking her to engage in anal sodomy and that "[i]t was a question of eventually just giving in." At trial, Petitioner was charged with and ultimately convicted of engaging in consensual sodomy with his wife.

II. Proceedings Below

The United States Air Force charged Petitioner with engaging in consensual anal sodomy with his wife. He was also convicted of an assault consummated by a battery on his wife and of soliciting her to commit prostitution. Petitioner was also convicted of several unrelated offenses of transporting and downloading pornographic images over the internet.

Petitioner appealed his conviction to the Air Force Court of Criminal Appeals. One judge on that Court ruled that Petitioner's conviction for consensual sodomy with his wife violated his fundamental Constitutional right to privacy. App. 20a-24a. The other two judges disagreed. App. 35a-44a.

The Court of Appeals for the Armed Forces granted review of the following issue:

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[4] These sexual activities were not prohibited by the laws of Nebraska or Colorado, where they occurred. Colorado was one of the first states to repeal its anti-sodomy laws. See 1971 Colo. Sess. Laws, Chapter 121, §121. Nebraska repealed its sodomy statute in 1978.

WHETHER APPELLANT'S CONVICTION FOR SODOMY, A PRIVATE CONSENSUAL ACT BETWEEN APPELLANT AND HIS WIFE, MUST BE SET ASIDE AND DISMISSED SINCE IT IS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO PRIVACY.

The Court of Appeals for the Armed Forces held that any Constitutional right to marital privacy in sexual matters "must bear a reasonable relationship to activity that is in furtherance of or supportive of the interests of the marital relationship." The Court of Appeals then affirmed Petitioner's conviction.

REASONS FOR GRANTING THE PETITION

The Government's Criminalization of the Private, Consensual, Non-Commercial Sexual Conduct of a Married Couple Violates Their Fundamental Constitutional Right to Marital Privacy.

United States citizens have a fundamental right to marital privacy which encompasses their right to engage in consensual, private, noncommercial sexual activity with their spouse. Thus, any statute impairing a citizen's fundamental right to such sexual activity must be strictly scrutinized. A statute prohibiting consensual sodomy between spouses, as in this case, is not based on a compelling governmental interest, and is also not a properly restrained method of safeguarding any such interest. As such, it is unconstitutional as applied to married couples.

The Fifth Amendment states that "No person ... shall be deprived of life, liberty, or property, without due process of law... ." Similarly, the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." This Court has long

recognized that the both Due Process Clauses "guarantee[ ] more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). These Due Process Clauses also include a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720, *see also Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

These Bill of Rights guarantees create a "penumbra" or "zone" of privacy, which creates a private sphere of individual liberty that is beyond the reach of the government. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). This right to personal privacy includes "making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Those decisions are ones made within the marital relationship, *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); decision-making related to child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); family relationships, *Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and abortion, *Roe v. Wade*, 410 U.S. 113 (1973).

This Court has held that these personal privacy interests do not prevent the government from prohibiting sexual acts between adult members of the same sex. *Bowers v. Hardwick*, 478 U.S. 186 (1986) addressed the issue of whether homosexual sodomy is protected by the Constitutional right to privacy and held that it is not. This Court found "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other." *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986). However, this Court refused to rule on the question of adult consensual

heterosexual activity - let alone activity within marriage. *Bowers v. Hardwick, supra*, 106 S.Ct. at 2842 n2. In fact, the dissenting justices in the case stated that "[t]he essential 'liberty' that animated the development of cases like *Griswold, Eisenstadt*,[5] and *Carey*[6] surely embraces the right to engage in [marital] nonreproductive, sexual conduct . . . our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms.'" *Id*, 106 S.Ct. at 2858 (Stevens, J. dissenting).

The right to intimate, private, consensual sexual relations between married couples is clearly a fundamental right, falling squarely with the zone of privacy recognized by this Court and expected by our citizenry. Accordingly, any attempt by the government to regulate this activity must be based on a compelling governmental interest, and the statute must be a properly restrained method of safeguarding that interest. The government has the burden of showing that it is pursuing a legitimate, compelling objective and that the means chosen are "necessary" to achieve that objective.

Here, the government fails to meet that burden. It has never articulated a compelling governmental interest sufficient to infringe on married citizens' right to freely participate in sexual activity within their marriage. In fact, there is no such compelling governmental interest, as it relates to consensual, private, noncommercial marital sex.

Further, the court below erred when it required that a spouse's sexual activity "must bear a reasonable relationship to activity that is in furtherance of or supportive of the interests of the marital relationship." Failing to apply the

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[5] *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct 1029, 31 L.Ed.2d 349 (1972).

[6] *Carey v. Population Serv. Intl.*, 431 U.S. 678, 97 S.Ct 2010, 52 L.Ed.2d 675 (1977).

standard strict scrutiny test required by the Constitution and this Court when a citizen's fundamental right is being infringed upon by a statute, the court instead deemed that Petitioner's sexual activity not worthy of constitutional protection based on its evaluation of the sexual acts and the Petitioner's marriage. Citizens who join the military do not automatically forfeit their fundamental right to privacy, and their military status does not justify the lower court's failure to follow this Court's precedents for analyzing statutes which infringe on those fundamental rights.

CONCLUSION

As demonstrated *supra*, the decision by the Court of Appeals for the Armed Forces' failed to recognize Petitioner's right to privacy with respect to sexual activity he engaged in with his spouse, and thus it failed to follow this Court's precedents regarding strict scrutiny of statutes infringing on citizens' fundamental rights. The Court of Appeals for the Armed Forces further erred when it created a test which requires determining that a citizen's specific sexual conduct with his spouse is in furtherance of a marital relationship before he is entitled to Constitutional protection.

Petitioner respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,

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